

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MICROSOFT CORPORATION,)
)
Plaintiff,) C10-01823-JLR
)
v.) August 13, 2013
)
MOTOROLA, INC., et al,) PRETRIAL
) CONFERENCE
Defendant.)
)

BEFORE THE HONORABLE JAMES L. ROBART
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Arthur Harrigan, Christopher
Wion, David Pritikin, Richard
Cederroth, Andy Culbert,
Nathaniel Love and Ellen
Robbins

For the Defendants: Ralph Palumbo, William Price,
Brian Cannon, Kathleen Sullivan
and Andrea Roberts

1 THE COURT: The clerk will call this matter.

2 THE CLERK: C10-1823, Microsoft versus Motorola.
3 Counsel, please make your appearances for the record.

4 MR. HARRIGAN: Good afternoon, your Honor. Art
5 Harrigan representing Microsoft. And I am here with
6 people that you already know: Mr. David Pritikin from the
7 Sidley firm.

8 MR. PRITIKIN: Good afternoon, your Honor.

9 MR. HARRIGAN: Mr. Cederoth from the Sidley firm.
10 Mr. Andy Culbert from Microsoft.

11 MR. CULBERT: Good afternoon.

12 MR. HARRIGAN: My partner, Chris Wion.

13 MR. WION: Good afternoon.

14 MR. HARRIGAN: Nat Love from the Sidley firm.

15 MR. PALUMBO: Good afternoon, your Honor. Ralph
16 Palumbo representing Motorola. And I also have folks you
17 have met before: Mr. Bill Price. Kathleen Sullivan.

18 MS. SULLIVAN: Good afternoon, your Honor.

19 MR. PALUMBO: Brian Cannon and Andrea Roberts.

20 THE COURT: Thank you. Nice to see you made it
21 back, Mr. Palumbo.

22 MR. PALUMBO: Thank you, your Honor.

23 THE COURT: Counsel, we are here for the pretrial
24 conference. I will go through my pretrial checklist, then
25 give you rulings on your in limine motions, and at the

1 conclusion of that I intend to take up Mr. Palumbo's
2 letter regarding Mr. Menenberg, Mr. Harrigan's letter
3 involving Germany, and also discuss with you some other
4 procedural matters.

5 Let's begin with the pretrial conference. I usually
6 take about three pauses as we go through this material.
7 If you have an immediate question that needs an answer,
8 feel free to interrupt. But know that there will be a
9 couple of times in here when I will ask you if there are
10 any questions.

11 You are scheduled to begin a jury trial on Monday,
12 August 26th, 2013. Motorola has belatedly asked for a
13 jury, which I have given them. The trial schedule will be
14 trial on the 26th, 27th, 28th, 29th, 30th, Monday through
15 Friday. The following Monday is a holiday and the
16 courthouse is closed. And we will have trial on the 3rd
17 and the 4th. That is seven trial days, which is an
18 eternity in this court.

19 The jury will be eight people. Please remember that
20 you are in federal court, and in civil trials there are no
21 alternates. So everyone who is in the box sits and
22 deliberates.

23 My trial hours are 9:00 to 10:30, 10:45 to noon, 1:30
24 to 3:00, and 3:15 to 4:30. We try to promptly start at
25 9:00, and we take a hard stop at 4:30. It is our

1 experience that many of our jurors come via the bus, and
2 in an effort to be courteous to them we ask them to
3 determine which bus going to catch, and then make sure
4 that they are able to do so. That's roughly five and a
5 half hours a day.

6 As I told you, you are on the clock. Each side is
7 getting 16 hours. You may wonder where the other five
8 hours go. The answer is there are some things for which
9 you are not charged, that seem to inevitably arise, most
10 notably my reading the jury instructions.

11 But know that in terms of charging your time, what I
12 have taken to calling the last minute matters, "Judge, we
13 have to talk about something before we bring the jury up,"
14 that counts, jury selection counts, openings count,
15 presentation of evidence, both direct, cross and rebuttal,
16 counts, and your closings.

17 For those of you who were here for the last trial,
18 there were clock management issues. And so if you haven't
19 worked under an on-the-clock system, I would urge you to
20 consult with your colleagues who have, and see if they
21 have any tips on how to use your time wisely.

22 In terms of jury impanelment, we will probably bring
23 in 32 to 35 potential jurors. I will ask them the civil
24 questions out of the recently revised judges' bench book,
25 and I will ask them anything that is in your submissions

1 to the court that I believe to be relevant.

2 I am not a believer in the invasion of the jurors'
3 privacy, and, therefore, questions like what's the last
4 book you read, what's your favorite movie, what do you
5 watch on television, just don't get asked.

6 I leave time for lawyer-conducted voir dire, which
7 makes me an exception around here. It many times isn't
8 all that long, 20 minutes to a half hour. Most of the
9 time I try and ask all of the embarrassing questions so
10 that you all can look like heroes in the eyes of the jury.

11 At the conclusion of all of that, we will meet at
12 sidebar, normally I send the jury out, let them take their
13 break, and I will ask you for your for cause challenges.
14 What you need to know about for cause challenges is that I
15 am a sucker for them. I believe that the parties deserve
16 to have jurors who want to be here, and, therefore, anyone
17 whose grandmother has died for the second or third time,
18 has booked a cruise, is having surgery, whatever, if they
19 don't want to be here they are likely not to be on the
20 jury. After the for cause challenges have been ruled on,
21 you will know the outcomes of those. We bring the jury
22 back in if they are on break, have them in their seats,
23 and we will do peremptory challenges.

24 Peremptory challenges here start with the plaintiff
25 doing one, the form goes to the other side and they take

1 one, and it goes back to the plaintiff, one, and to the
2 defendant, one. It is a practice in some jurisdictions if
3 you have passed Juror 3, you can't go back and do 1 and 2.
4 That is a rule that is not followed in the Western
5 District of Washington.

6 We have a handout about jury impanelment which you are
7 welcome to pick up. You told me that you wanted to do a
8 questionnaire, and I have not heard anything further about
9 that, so I will ask -- Yes, sir.

10 MR. PRITIKIN: Your Honor, we have agreed on the
11 questionnaire, and I have a copy of it, which I could hand
12 up to the court if you would like me to.

13 THE COURT: Please do so. How long is it?

14 MR. PRITIKIN: It is short. We tried to take to
15 heart your admonition and we kept it to just a couple of
16 pages. I think it is three pages.

17 THE COURT: Only three is a couple to you guys. I
18 am going to be able to make it shorter, because they will
19 have completed the court's form and it picks up --
20 Mr. Pritikin, this seems to be double-sided.

21 MR. PRITIKIN: You're correct. It is four pages.
22 I stand corrected.

23 THE COURT: All right. We will get it reduced in
24 size. They will have filled out the court's form before
25 they get here and I may include the court's questions into

1 your form. I won't know who I will be getting as a jury
2 pool that morning if there are other cases going out, so
3 this will not be able to be filled out by that more select
4 group until they know that they are coming up here. We
5 will see if we can't work with you on that.

6 MR. PRITIKIN: Thank you.

7 THE COURT: Time for me to take my first break.
8 Mr. Harrigan, or whoever is speaking for Microsoft, any
9 questions thus far?

10 MR. HARRIGAN: I don't have any questions so far,
11 your Honor.

12 THE COURT: Mr. Palumbo.

13 MR. PALUMBO: Neither do I, your Honor. Thank
14 you.

15 THE COURT: Moving on then to opening statements.
16 Prior to the presentation of opening statements, I will
17 read the preliminary jury instructions. I will tell you,
18 of the preliminary jury instructions, the one that you
19 really need to work on is Number 2, the agreed statement
20 of the case.

21 I noticed in your proposed instructions you were able
22 to agree on this is a case between Microsoft and Motorola.
23 One proposed instruction, I think, is 16 pages long, and
24 one is about two and a half. If you don't come up with an
25 agreed statement of the case, we will. That means that we

1 will take our hatchet, as opposed to you taking your
2 scalpel.

3 Having the rare opportunity of going back to talk to
4 jurors now for nine-plus years, I think one of the things
5 that I certainly made as a mistake in private practice was
6 not recognizing that the jury knows absolutely nothing
7 about your case other than what is read to them in that
8 Preliminary Instruction Number 2. And then you get up and
9 start doing your openings, and they all look at each other
10 like, what language is he speaking? I really would urge
11 you to be thoughtful in terms of preparation of that. Our
12 agreed statement of the case will be very brief and not
13 terribly helpful. You then are going to have an even more
14 difficult time. Know that that's a wonderful opportunity
15 to educate the jury about the factual context of the
16 arguments that you are going to be making.

17 In terms of the length of openings, I don't care. It
18 runs against your time. Take as long as you want. We
19 have noticed that after about 30 to 40 minutes, the length
20 of a one-hour television show, they start to glaze over.
21 I think the longest opening we have had was four hours,
22 and the jury was out less than seven minutes deciding
23 against that party. Use your best judgment. You are all
24 experienced trial counsel.

25 The procedure in opening is one of the two times that

1 you are permitted to roam around in the well. The line is
2 drawn from me to the clock on that back wall, that space
3 belongs to the jury, and you are to get no closer to them
4 than the line. You are welcome to come up here and be
5 directly in front of the jury.

6 When we do civil trials with a limited number of
7 jurors we will sit them one, two, three, four in the front
8 row, five, six, seven, eight in the back row. Those empty
9 seats at the end are going to be empty.

10 You can move from the podium. The configuration for
11 running your electronics is not great. It will be easier
12 if you have someone running your electronics and you can
13 flash them signals or whatever. Most people seem to find
14 it most convenient to put their notes on that extension
15 that sticks out from the podium and use that as a place to
16 rest things.

17 If you are going to use visual aids, including
18 potential exhibits, in the opening, they must be disclosed
19 to the other side. If there are objections to them, they
20 will be included in your last minute matters and I will
21 rule on them at the time. I just think that it is tacky
22 in opening statement to put up an exhibit and then have
23 the other side object.

24 In terms of your exhibits, both of you have been
25 through a trial here so you know how that works. We have

1 another handy handout for use with that.

2 In terms of witness disclosure/scheduling, my rule is
3 that by 4:30 of the day before they are scheduled to
4 testify you have to tell the other side who your witnesses
5 are going to be. The jury hears me say that it is in an
6 effort to use their time wisely that we are taking a
7 witness out of order, and they all smile and think it is
8 great that you are trying to use their time wisely. They
9 have no trouble understanding that a witness for the
10 plaintiff is appearing in the middle of the defense case
11 or vice versa. I know you have a number of experts and
12 sometimes getting them to cooperate is a difficult thing.
13 Although if you pay them enough, I guess they will come
14 any time. Know that if you can't agree among yourselves
15 and you need me to referee it, I will likely say our goal
16 is to get witnesses to testify, and scheduling is kind of
17 secondary.

18 There is technology training available. It is next
19 Wednesday. Please come in and play with the machines if
20 you haven't had the chance to. This courtroom is fairly
21 well equipped. There are individual screens. There is a
22 screen back behind Mr. Price, which is on most of the
23 time. For some reason, putting things on the visual
24 display presenter upside down is a common epidemic for
25 this particular brand of display presenter, and the jury

1 just thinks that is hilarious. I guess so do I. So come
2 in and try the stuff and make sure that you are familiar
3 with it.

4 If you want to put someone back on one of those
5 benches or a chair to run your audio/visual stuff, that's
6 fine with us. Work with the clerk on accommodating that
7 setup.

8 I will stop once again and ask -- We will switch this
9 up. Mr. Palumbo, any questions?

10 MR. PALUMBO: Just a couple of things, your Honor.
11 My experience is the same as yours. Our opening won't be
12 longer than 60 minutes, at the most, I think. And we just
13 wondered whether Microsoft would be willing to share about
14 how much time they are going to take with openings?

15 MR. HARRIGAN: We have been talking about roughly
16 an hour also, your Honor.

17 MR. PALUMBO: With respect to the revised
18 preliminary instructions, which we had planned to do in
19 light of your Daubert and summary judgment orders, and
20 also your rulings today on the motions in limine, when
21 would you like to have those?

22 THE COURT: The earlier the better. I think those
23 have already been filed. We have pretty much allocated
24 all of next week to work on them. By close of business --
25 in fact, by noon on Monday would be best.

1 MR. PALUMBO: I think we can do that. We will
2 work with Microsoft to see if we can come to an agreement.
3 If not, we will both submit proposed preliminaries.

4 I think you covered this, but we have reached a
5 tentative agreement on exchange of direct exhibits the
6 night before and demonstratives the night before, and
7 objections. If there is anything to bring to your
8 attention arising out of that exchange for objections, we
9 will deal with that before you bring the jury in in the
10 morning, or do you want to rule as the exhibits come in?

11 THE COURT: To the extent that you know you have
12 problems with them now, and you know they are going to be
13 introduced, I would rather take that up early.

14 MR. PALUMBO: Before the jury comes in?

15 THE COURT: The only thing that I do that is a
16 peculiarity is using the jury's time wisely. We ask these
17 people to come in, they give up their time, many of them
18 don't get paid to serve as a juror. They do not
19 understand why I have to keep sending them back into the
20 jury room. So I discourage sidebars, unless it is really
21 necessary. I particularly discourage sidebars if it
22 involves sending them back into the jury room. Sometimes
23 they just can't be helped. But we try and use their time
24 wisely. I am happy to come out early during the trial,
25 stay over part of a lunch hour, stay after 4:30 to do

1 things we know are going to be coming up. If the jury is
2 here, you will find me pretty adamant that we are going to
3 have presentation of evidence. If the jury is not here, I
4 am a little more flexible.

5 MR. PALUMBO: We share your appreciation of these
6 people serving and often not getting paid. We will do
7 everything we can to work out objections and try to
8 minimize it. If we think we have a significant issue, can
9 we get ahold of you in advance and say -- do something at
10 8:30 so we are ready to go at 9:00?

11 THE COURT: Yes. Just call. This will be
12 particularly difficult, because I assume you are going to
13 have a problem with a lot of Microsoft employees on the
14 jury. Microsoft is one of the companies that pays its
15 employees to serve on juries. You are likely going to
16 have a lot of Boeing employees, a lot of Starbucks
17 employees and state employees, because they won't have the
18 economic hardship argument.

19 Mr. Harrigan.

20 MR. HARRIGAN: Yes, your Honor. I have basically
21 one area. It may be premature. It has to do with
22 assuming the findings are in fact going to be available to
23 use, how to go about that. Would you like to take that up
24 now or later?

25 THE COURT: Later.

1 Moving on then to depositions. I am working my way
2 through your depositions. There seems to have been an
3 epidemic of objections, most of which are falling by the
4 wayside. I will get those back to you as promptly as I
5 can, because it appears that most of these are video
6 depositions and you will want to edit out those parts that
7 I have gotten rid of. So thank you for your compliance
8 with that local rule, and I will get them back to you as
9 soon as I can. You should see no significance in the fact
10 that Microsoft will get its deposition designations back
11 first, but that is only because they are going to be using
12 them first. That's the reason for that. It has no other
13 significance.

14 Mr. Palumbo.

15 MR. PALUMBO: Your Honor, we would like to save
16 you some time. Both your Daubert order and your summary
17 judgment order, and perhaps your rulings on motions
18 in limine, we think will permit us to narrow our
19 objections. To the extent that you haven't started
20 looking at those, we would be happy to, again, look at the
21 designations and, to the maximum extent possible, narrow
22 the testimony that we may offer through depositions at
23 trial.

24 THE COURT: That would be helpful.

25 MR. PALUMBO: We can start getting those to you

1 quickly. We will pick the ones we think need the most
2 significant narrowing.

3 The other issue is, we have designated deposition
4 testimony of Microsoft employees who reside in the Western
5 District. We have inquired of Microsoft whether they will
6 require us to call those witnesses live. If those
7 witnesses are going to be live, either Microsoft is going
8 to call them live or they are going to require us to call
9 them live, then you won't have to deal with any of those
10 designations. So we will try to work that out with
11 Microsoft. To the extent that witnesses are going to be
12 live, we will immediately notify you so you won't even
13 have to look at those designations.

14 THE COURT: That would be helpful. I am in a
15 witness right now where I know that is very much a live
16 witness issue, but I have already marked in the margin any
17 number of circumstances where there is an objection to
18 something that has been excluded by my rulings on motions.
19 That would be helpful.

20 MR. PALUMBO: Art, can we resolve that issue today
21 or tomorrow so we can let him know to the extent the judge
22 does not have to look at those designations?

23 MR. PRITIKIN: I think that makes a lot of sense.
24 Your Honor, what I would suggest is that perhaps both
25 sides, in light of the rulings and where we are today, go

1 back and see what we can cut out of it, and then get you a
2 revised set of designations whenever you would like us to
3 do that. We can turn to it very promptly.

4 THE COURT: That would be great. The sooner the
5 better. Particularly before, say, close of business
6 Friday would be helpful.

7 MR. PALUMBO: I think we can do that, your Honor.
8 Thank you.

9 MR. PRITIKIN: Very good, your Honor.

10 THE COURT: Jury instructions, you have already
11 submitted them. Mercifully, you have followed the local
12 rule. Let me explain what will happen next. We will get
13 you, as soon as we complete them, a draft set of jury
14 instructions.

15 We have an informal conference, which you can tell is
16 informal because I come out without my robe on, that is
17 not on the record, where we simply talk about the
18 instructions that the court has proposed, and then ones
19 that you have proposed that we didn't give. That's an
20 uphill struggle, but we want to hear why you think we
21 screwed up and didn't get it right.

22 Armed with that discussion, we will then go back and
23 finalize. It is against that set that you will be taking
24 your formal exceptions.

25 This is, as I have mentioned, for us a longer trial,

1 and therefore there is not quite the time pressure that
2 there is in some, for example, criminal matters, where it
3 is three days, which means you have to take exceptions at
4 the end of the second day.

5 Don't panic when you see the jury instructions and
6 assume, good heavens, this is completely unacceptable.
7 You will get a chance to comment on them, and then the
8 exceptions will be taken.

9 The exception conference may and formal exceptions
10 will run against your time limits, unless I haven't used
11 up all of my time, or we can get it in outside of court
12 hours. That's how that will work.

13 The last issue that I usually take up is, are there
14 any anticipated problems that the court can help you with
15 now?

16 Mr. Harrigan.

17 MR. HARRIGAN: My main question is still about the
18 findings. It sounds like we ought to talk about that
19 after we hear your rulings.

20 THE COURT: That issue is front square in the
21 motions in limine.

22 MR. HARRIGAN: The question basically is, we would
23 like to use the findings in the opening, and we would like
24 to know if we are going to --

25 THE COURT: You will know before then.

1 Mr. Palumbo, issues?

2 MR. PALUMBO: My questions relate to witnesses
3 whose testimony in either ITC or trial testimony that has
4 been designated, we would like to address whether they
5 testify live. And then the other thing is witnesses who
6 potentially could be called in Microsoft's case and in our
7 case. We would like to talk about the best procedure to
8 streamline those witnesses. I am happy to do that at any
9 point in time.

10 THE COURT: I will tell you that I was surprised
11 to get to -- let's see, I think it is in Microsoft's
12 designations, and find testimony from an ITC hearing being
13 sponsored apparently as testimony to be used at trial. I
14 turned that one sideways in my pile of depositions. I
15 need to go back and read the circumstances in which use of
16 such testimony is permissible. It seems to me it falls
17 under 32(a)(4), unavailable witness, because you are not
18 using it for impeachment, which would be 32(a)(2). So I'm
19 not sure who these people are in terms of 32(a)(3),
20 "deposition of a party, agent or designee," which may be
21 used for any purpose. And so I'm not sure that I am
22 prepared to rule on that today. But if we have some time
23 at the end, I will hear the parties' positions on that
24 particular question.

25 Where that seems to me most likely will arise will be

1 32(a)(5), depositions taken in an earlier action, appears
2 to also be at play in this. Although, it then simply
3 contains a cross-reference to the Federal Rules of
4 Evidence, which will send me further into my research. I
5 would welcome your points of view on that. We will take
6 that up in a moment.

7 Motions in limine -- Unless people have any other
8 anticipated problems? All right. There are three
9 Microsoft motions in limine. I will do those first. The
10 first of which is -- these are all found in Docket 799,
11 which is the redacted version, or 801, the sealed version.

12 Microsoft seeks to exclude everything Motorola or
13 Google claimed privilege on during discovery. In
14 particular, all information relating to the reasoning
15 behind its October 2010 demand letters.

16 First, in my reoccurring habit of haranguing you, I
17 asked for a timeline or chronology which you all agreed
18 and said you would get to us promptly, and I have never
19 seen. Does anyone know where that project is?

20 MR. PRITIKIN: Yes, your Honor. They had agreed
21 to take a first stab at it. We got the draft from them at
22 12:01 a.m. this morning. We are looking at. I think we
23 will be able to get you the timelines in the next day or
24 so.

25 THE COURT: It would have been helpful. I will

1 remember to give you deadlines in the future.

2 I deny Microsoft's motion regarding "privilege." My
3 reasoning for doing so is the following: In this pending
4 litigation -- At the time that these letters were sent
5 there was pending litigation, as I understand it.
6 Particularly, there was litigation pending when Microsoft
7 filed the present lawsuit. And, therefore, as the court
8 has worked its way through the very specific questions
9 that you have raised, in Mr. Leonard's testimony, an
10 argument about were Motorola's letters just Motorola's
11 customary offer letter. There is a lack of context
12 regarding Microsoft's and/or Motorola's particular
13 circumstances at the time that the letters were sent, and
14 I find that there is a good-faith basis for Motorola's
15 assertion of privilege.

16 I would note that I am misusing a term here that I'm
17 not sure you all appreciate. It is the attorney-client
18 privilege, and it is the attorney work-product doctrine.
19 You all call both of them privileges, which I think is
20 technically incorrect. Were Wigmore, wherever he is,
21 still alive, he would be rolling over in his grave.

22 As I understand Microsoft's challenge to this, it is
23 not that the privilege claims aren't well taken, but more
24 an argument that it is unfair for Motorola being able to
25 present an explanation for sending the letters, and then

1 claiming privilege over other aspects of the background
2 where they say a privilege covers. My sense is, that is
3 litigation, folks.

4 This is not a situation where Microsoft has asked for
5 documents to be submitted for in camera review, and
6 therefore I have not had occasion to find that Motorola
7 has failed to sustain its burden of showing that a
8 privilege exists.

9 Generally, I think, to the extent that some of the
10 things you have asked for are privileged, and Motorola has
11 taken the position that it is, and Microsoft says that it
12 is not, or it would certainly be helpful if we could have
13 access to it -- I am not convinced. For example, I
14 recently finished reading the Brian Blasius deposition.
15 It is clear that he mentions claim charts, but he also
16 contends that they are privileged. And there is not a
17 showing to overcome that.

18 Finally, our examination in this area takes us into
19 something that has been very much a black hole for us.
20 And that is, should we exclude evidence of the reduced 50¢
21 per copy offer. That has driven us into a distinction
22 between business negotiations and settlement negotiations.
23 A business negotiation can potentially lead to a
24 settlement of a lawsuit as a collateral impact. But I
25 don't think that it is correct to attempt to claim

1 privilege or prevent introduction of evidence by saying it
2 is a settlement negotiation when the clear purpose appears
3 to have been business negotiations. That's particularly
4 true in this case because Microsoft has placed Motorola's
5 business negotiations in issue in regards to its bad faith
6 allegation.

7 Ultimately, we have come to the conclusion that the
8 question of material that was claimed as privileged, as it
9 pertains to those October demand letters, that motion
10 excluding any mention of the area is denied. We will
11 permit Motorola to present the related evidence, even
12 though Microsoft has not had an opportunity to conduct
13 discovery concerning certain aspects of those particular
14 negotiations or reasons.

15 The second motion is one in which Microsoft seeks to
16 exclude Motorola's argument that Microsoft has "unclean
17 hands," including making a RAND commitment to the SD Card
18 Association, and made a RAND commitment to the public at
19 large in its interoperability principles. I grant this
20 motion.

21 This is something that has appeared quite late in the
22 lawsuit, and seems nothing more to the court than, if our
23 hands are dirty, theirs are dirty also. This question has
24 been in the lawsuit for a long time, the unclean hands
25 argument, but it has always been based on Microsoft's

1 filing of the lawsuit before negotiating and applying for
2 a license. I think it is too late at this time to now
3 launch a new theory of unclean hands in aspects unrelated
4 to SEPs into the case.

5 In addition, the probative value of this area seems to
6 me to be remarkably low, since I'm not going to permit
7 testimony as to the SD Card Association or the
8 interoperability principles. That just seems like a black
9 hole that the jury will go down and be thoroughly confused
10 about: "What does it have to do with this lawsuit?" It
11 simply seems to me to be an effort by Motorola to attack
12 Microsoft's credibility as a company.

13 There is a high risk of delay and confusion, and,
14 furthermore, a high risk of taking a lot of time to lay a
15 foundation for that and explain the relevance of it for
16 actually no purpose. So the court is granting the unclean
17 hands motion in limine.

18 The third Microsoft motion in limine is moving to
19 exclude evidence and arguments concerning the parties'
20 settlement communications and negotiations status.
21 Included in that motion is both Federal Rule of Evidence
22 408 and nondisclosure agreement arguments.

23 In this instance Microsoft is seeking to use this as
24 both a sword and a shield. It was a sword when Microsoft
25 wanted to obtain discovery concerning these issues, and it

1 is a shield when it wants to protect or prevent the jury
2 from hearing evidence. I am going to deny the motion
3 in limine.

4 My reason for doing so is that I was persuaded by the
5 line of cases cited by Motorola, which say, in essence,
6 that when settlement conduct is the subject of litigation,
7 Rule 408 does not prevent parties from introducing
8 evidence of settlement negotiations to prove their claims.
9 The authority for that is the Century Indemnity Company
10 case at 336 Fed.Supp. 2d 739, and the Pacific Federal
11 Savings Bank case, which is -- I will give this as a
12 non-case cite, WL 188409, at apparently Page 2.

13 The quotation I found significant there is, "Federal
14 Rule of Evidence 408 does not preclude evidence of
15 settlement discussions that is offered to show an
16 insurer's bad faith failure to settle a claim."

17 Using an analogy of a party suing an insurance company
18 for bad faith failure to settle, evidence of what was said
19 in the original settlement negotiations could be used
20 against it in the ensuing bad faith action. That, in our
21 mind, is analogous to what we have here, and the same
22 principle applies. Thus, the licensing negotiation over
23 the patents are the subject of the good faith/bad faith
24 lawsuit about the parties' conduct during the
25 negotiations.

1 Under the authority that we cited above, it makes no
2 sense to exclude evidence from these negotiations in the
3 ensuing lawsuit. Otherwise, the ensuing bad faith lawsuit
4 simply could not exist.

5 These cases concluded, and we should conclude, that
6 408 does not bar evidence of negotiations in a lawsuit
7 regarding the conduct during those negotiations. Thus,
8 Microsoft's motion to exclude under 408 will be denied
9 entirely.

10 The same reasoning applies to Microsoft's motion to
11 exclude under the nondisclosure agreement. The
12 nondisclosure agreement is more expansive than Rule 408.
13 It basically says that no settlement discussions between
14 the parties can be used in court ever, unless the evidence
15 was independently obtained during discovery.

16 However, applying the above reasoning, it is easy to
17 conclude that the intent of the parties in crafting the
18 nondisclosure agreement could not have been to prevent the
19 parties from litigating bad faith in negotiating claims.
20 Thus, Microsoft's motion to exclude settlement
21 negotiations under the NDA also is denied.

22 There is another argument for why Federal Rule 408
23 does not bar evidence relating to the licensing
24 negotiations. It is analytically related to the above
25 argument but creates a slightly different result. If you

1 dissect the grammar of Federal Rule 408, it appears to bar
2 evidence of efforts to settle the claim being actively
3 disputed in the lawsuit. In this case that means neither
4 side could introduce evidence of efforts to settle the
5 breach of contract claim.

6 It would not mean that they couldn't introduce
7 evidence of efforts to settle separate patent infringement
8 claims. In other words, pure licensing negotiations would
9 be in under 408, but not efforts to settle the breach of
10 contract case.

11 That would be an awfully fine line between efforts to
12 negotiate a license versus efforts to settle the breach of
13 contract claim. They are closely related. And it is
14 probably fair to say that licensing negotiations occurring
15 prior to the filing of the breach of contract lawsuit are
16 pure licensing discussions and would be admissible.

17 On the other hand, any licensing discussions after the
18 breach of contract case was filed are probably too closely
19 related to the breach of contract claim, and would be
20 excluded under 408. In other words, any post-lawsuit
21 licensing discussions would presumably implicate a global
22 settlement deal.

23 That would give us an easy dividing line to drive the
24 parties at trial. If we went that route, we could
25 mechanically apply the line of cases described earlier, or

1 allow things to work out independently through discovery.

2 As you can see, I read this particular segment of my
3 opinion because we spent a lot of time trying to see which
4 side of the head of the needle the evidence falls on. And
5 this is our best effort. This is why we have jury trials,
6 and you both are going to get to present your best
7 evidence.

8 Turning then to Motorola's motions, which are found in
9 redacted form in Docket 795 and in sealed form in
10 Docket 797. Number one, Motorola asks the court to
11 exclude from the jury's consideration the court's
12 determination of RAND rate and range. That one is easy.
13 It is denied.

14 The Findings of Fact and Conclusions of Law are
15 relevant to the upcoming trial on bad faith because they
16 are central to the upcoming trial, and so are Motorola's
17 October offer letters. The actual value of a product is
18 relevant to whether the price requested in an offer is one
19 made in good faith.

20 The best analogy that we could come up with is that if
21 I offer you my federal-issued beat up old Blackberry for
22 \$500, it could be bad faith. Whereas, if you offered a
23 brand new model phone, I won't mention who is the
24 manufacturer, for \$500, that could be a great deal. It
25 all depends on the value of the actual product. That is

1 why the RAND rate is relevant.

2 Regarding Motorola's proposed jury instruction, we
3 will issue our ruling on that when we release the jury
4 instructions. It is something that we are continuing to
5 work on at this time.

6 We need to figure out how to provide the Findings of
7 Fact and Conclusions of Law to the jury, and we are not
8 finding a lot of guidance or practical help from other
9 sources on how we do that in a manner that satisfies 401
10 and 403.

11 Motorola motion two seeks to exclude opinions and
12 argument concerning positions taken in the November 2012
13 RAND trial. As a preliminary matter, I would note that
14 the parties have agreed that the only experts who could
15 testify at trial were those that provided expert reports
16 according to the court's prior schedule. Nowhere in there
17 was there an agreement that the testimony would exclude
18 all opinions and arguments concerning positions taken at
19 the RAND trial.

20 And Motorola offered any number of instances where it
21 cherry-picked out things that it liked from the Findings
22 of Fact and Conclusions of Law and put them into its
23 expert reports. For example, "Judge Robart held that the
24 initial offer didn't have to be RAND." So I find its
25 current motion almost disingenuous. I am denying it. A

1 party does not get to say one thing in litigation and then
2 pretend it didn't happen.

3 I actually was going to go on the internet and try and
4 find the analogy of the 800-pound gorilla in the room, or
5 it may be an 800-pound pink elephant in the room, which
6 everyone ignores and doesn't mention. Here, Microsoft
7 wants to use Motorola's prior positions and arguments to
8 impeach Motorola's expert witnesses. The court finds that
9 under the balancing argument, implicit in Evidence Rules
10 401 and 403, that the balance shifts favorably towards
11 admission of those prior positions. The motion is denied.

12 Finally, the third Motorola motion in limine was to
13 exclude evidence and argument or reference to privileged
14 communications. This is very similar to Microsoft's
15 in limine motion number one, which dealt with everything
16 Motorola or Google claimed privilege on during discovery,
17 and in particular all information concerning the
18 reasoning.

19 In this particular litigation the court has previously
20 ruled that those matters which are privileged, properly
21 so, are going to be excluded because they are privileged.
22 There has been no challenge presented to this evidence in
23 which the court has been asked to examine the documents,
24 and therefore I have no basis to conclude that any of the
25 claims of privilege are incorrect.

1 I think, once again, this is one of those
2 circumstances where the complaint that we have from
3 Microsoft is that it is unfair that some stuff comes in
4 and some stuff stays out. That's particularly true in
5 regards to Mr. Leonard. Our answer to that is, that is
6 basically how litigation works. The motion is granted.

7 Those will be the rulings of the court on the motions
8 in limine.

9 Counsel, starting with Mr. Harrigan, any questions?

10 MR. HARRIGAN: No, your Honor.

11 THE COURT: Mr. Palumbo? Mr. Price, you can talk
12 if you want.

13 MR. PRICE: In addressing our third motion
14 in limine, I don't think you quite said on the record
15 whether you are denying it or you are granting it.

16 THE COURT: I am granting it, in that if you
17 claimed it was privileged, then it is privileged, and it
18 is not going to be admitted.

19 MR. PRICE: That's what I inferred. Thank you.

20 MR. HARRIGAN: Your Honor, back to my earlier
21 question about findings. Is this an appropriate time?

22 THE COURT: Sure. Go ahead. Are you going to
23 offer a solution to this dilemma?

24 MR. HARRIGAN: I was hoping to at least get
25 something out for discussion. Our view on this is that

1 the parties should each have the findings available for
2 their use, that if any finding is going to be used, it
3 needs to be read into the record and probably marked as an
4 exhibit. The court can rule on them, but it could -- in
5 terms of designating exhibits in advance and giving the
6 other side notice that would apply to the findings.

7 The way that we actually envisioned using the
8 findings, your Honor, for the most part, is, for example,
9 if Mr. Murphy -- if Dr. Murphy, the economist, is up
10 there, he could refer to the findings in connection with
11 his opinion testimony, and those findings would be read at
12 that time and marked at that time, rather than -- In
13 other words, we don't propose to stand up and read 80
14 findings to the jury. We propose to weave them into the
15 presentation of the case. We believe they are up for
16 grabs -- the whole collection is up for grabs by either
17 side. Obviously you would be crazy to use more than the
18 ones that are directly relevant. We assumed that would be
19 sort of self-regulating. That is our basic --

20 THE COURT: When would you disclose to the other
21 side which ones you intend to examine?

22 MR. HARRIGAN: Yes, your Honor. In fact, frankly,
23 I was thinking in a week we ought to say, here are the
24 ones we currently believe that we are going to use. We
25 would still have the ability to designate others as they

1 became relevant, but we would make a good faith effort to
2 identify all of the ones that we think we are going to
3 use. And then if there is some particular reason why
4 Motorola objects to one or more of those, that could be
5 dealt with before the trial starts, and we will all know
6 what we can do in the opening statement, which would be
7 very helpful.

8 THE COURT: All right. Mr. Price, do you want to
9 take this one?

10 MR. PRICE: Your Honor, we are in a difficult
11 situation here. Obviously we know that your Honor said
12 that you were going to resolve two discreet issues in the
13 first trial. That was the RAND royalty range and the RAND
14 royalty point. Of course, I think we have preserved our
15 Seventh Amendment arguments in our motion. I just want to
16 make sure we don't waive those.

17 THE COURT: Tell me, does the Apprendi decision
18 apply to civil cases?

19 MR. PRICE: Let me ask somebody who knows
20 constitutional law, the expert.

21 MS. SULLIVAN: Your Honor, you are talking about
22 what issues are for the court and what are for the jury?

23 THE COURT: I am curious, you make the argument
24 that I have to exclude the findings and conclusions under
25 Apprendi. I have some real questions about that.

1 MS. SULLIVAN: I don't believe we relied on it for
2 that point. The point we are making here is much more
3 just an old -- the old doctrine that common issues of
4 law -- common issues of fact common to a bench phase and a
5 jury phase can't be decided by the bench, they need to be
6 decided by the jury.

7 Our position in the case I think has been consistent,
8 that your Honor decided to adjudicate, in your words, two
9 discreet issues, a RAND royalty range for Motorola's
10 standards-essential patents and a RAND royalty point for
11 Motorola's standards-essential patents. There are 200
12 pages of learning. And they exist, of course. But our
13 position is those should not be evidence before the jury.

14 You can encapsulate the law in the case in your
15 instructions to the jury. That is the proper way to deal
16 with bench findings. But the idea that your findings are
17 going to be turned into evidence and speaking in the court
18 through Mr. Murphy's mouth is completely inconsistent with
19 the notion of a jury trial. Mr. Murphy can speak for
20 himself about what he has to say. But he can't channel
21 your Honor.

22 So our position is that the instructions are the place
23 to deal with the findings. Obviously we will take to
24 heart your Honor's view that there is a gap between the
25 18-page version of Preliminary Instruction Number 2

1 Microsoft proposes and the succinct paragraph we proposed
2 as our fallback. But it is the instructions where your
3 Honor's findings should be set forth. That shouldn't come
4 in as evidence to be whipped out any time Microsoft wants
5 to make the judge a witness in this case. You shouldn't
6 be a witness in the case. That is really our point, your
7 Honor.

8 THE COURT: I am not a witness in this case. I am
9 the judge. And --

10 MS. SULLIVAN: Of course, your Honor. That's why
11 it should be in the instructions, not in the evidence --

12 THE COURT: You should allow the judge to speak
13 then, counsel, as opposed to interrupting.

14 MS. SULLIVAN: Excuse me, your Honor.

15 THE COURT: I know that works in the appellate
16 courts. It doesn't work around here. In fact, I'm not
17 sure it always works in the appellate courts from what I
18 have seen.

19 You, being Motorola, committed to a bench trial. In
20 the course of that the court made numerous findings, one
21 of which is a range of RAND rates in this case. If I take
22 your assumptions, the jury would never know that until it
23 got to the final findings -- jury instructions because it
24 is a secret that I can't tell them what has already been
25 ruled on in the case. And yet, you have -- I believe it

1 is Mr. Holleman. You have Mr. Holleman up there saying:
2 The judge has found as part of his ruling what Motorola
3 like from the Findings and Conclusions. I find some real
4 inconsistencies in the position here. Help me with that.

5 MS. SULLIVAN: May I answer, your Honor?

6 THE COURT: Yes.

7 MS. SULLIVAN: Well, thank you, your Honor. We
8 are now informed by your Honor's ruling on the motion
9 in limine. We now are not, obviously, pursuing the
10 position that there should be exclusion. What I was
11 trying to address, and I'm afraid it has necessarily not
12 been fully briefed, because Mr. Harrigan's statement just
13 now was not briefed to us, so I am trying to spontaneously
14 answer his spontaneous suggestion that the findings be
15 available freely to be used in evidence. To that, your
16 Honor, I guess I am trying to draw a new distinction that
17 is subsequent to your Honor's motion in limine ruling.

18 We accept, as we must, that you have ruled against
19 excluding findings. I am respectfully suggesting that our
20 position is that your findings should come in through
21 instructions to the jury that guide them on the law of the
22 case, and the findings not come in as free-form evidence
23 to be introduced later in the case. That's the best way
24 to deal with them.

25 Obviously, if your Honor keeps them out for one set of

1 witnesses, you should keep them out for the others as
2 well. We wouldn't be suggesting any asymmetry here.

3 Your Honor, we are hoping that we can clarify what the
4 instructions should say about the findings, but then that
5 neither side use them opportunistically as evidence.

6 I understand your role completely, your Honor. I am
7 trying to respect that role, and suggest that you
8 shouldn't be invoked as evidence. You are the law-giver
9 here, and you should speak through the instructions and
10 not through the mouths of Dr. Murphy or Mr. Holleman or
11 anyone else. That's the suggestion.

12 THE COURT: Before you sit down, I want to make
13 sure I understand this. Let's deal precisely with the
14 paragraph in the Findings and Conclusions where I set a
15 RAND rate on H.264. Your position would be that the jury
16 would never know that until it got to the final jury
17 instructions?

18 MS. SULLIVAN: Not at all, your Honor. You could
19 set it forth in the preliminary jury instructions as well,
20 as part of the framework for the case. I am trying to
21 draw as a distinction between you setting the law of the
22 case and your findings being used to provide evidence in
23 the case. That's the fundamental distinction here. We
24 are not suggesting at all that you wait until the final
25 instructions. What we proposed as our fallback

1 alternative instruction was a preliminary instruction.

2 THE COURT: I don't think I would characterize the
3 Findings of Fact that the court reached after a trial as
4 evidence. I would characterize them as Findings of Fact
5 that were made by the court.

6 Mr. Price, only one of you gets to argue at a time, so
7 sit down.

8 In the first trial phase, I sat as both the finder of
9 fact and as the judge making conclusions of law. Now you
10 somehow want to repudiate those Findings of Fact, which
11 are facts that have been decided as the facts of this
12 case. We are not in a separate case, we are in the same
13 case. You are saying, oh, but that would be evidence. It
14 seems to me they are not. They are findings of fact. The
15 court has made that decision. That's where we seem to
16 have this disconnect. I am not trying to blame you for
17 this, I am just apparently not understanding your
18 argument.

19 MS. SULLIVAN: Your Honor, may I ask Mr. Price to
20 answer that one?

21 MR. PRICE: I think I can bridge that, your Honor.
22 I think what the court, given where we are now, should
23 tell the jury is that certain things are not in dispute,
24 because at this point you made findings. I actually think
25 it is prejudicial to say there has been a trial, one side

1 took one position, one side took the other, and I decided
2 they are right, they are wrong, because they might think
3 this is just a victory dance. But you made certain
4 findings of fact. As part of an instruction you can say
5 to them it is fact, certain things are no longer in
6 dispute. The question is what exactly in all of that you
7 have written, you know, do plaintiffs want to tell the
8 jury. Because I think there are solid arguments that some
9 of those findings are relevant to what you found, for
10 those two ultimate issue on range and a particular point,
11 may not be relevant to this part of the trial where the
12 question isn't where would you end up after a negotiation,
13 but what happens here and what has to happen before you
14 reach the end.

15 THE COURT: Let me ask you this hypothetical,
16 Mr. Price: You need to defend Microsoft contending that
17 you are in bad faith?

18 MR. PRICE: Yes.

19 THE COURT: And Microsoft stands up and says, they
20 wanted 2.25 percent for interlaced video. In the course
21 of the first phase of this case I found that interlaced
22 video was an antique technology that had little to no
23 value. That's a finding of fact. Where does that fall in
24 your spectrum of things that they shouldn't know because
25 they are really irrelevant?

1 MR. PRICE: That is actually a good question. I
2 haven't had time to think that completely through. My
3 initial reaction is that the ultimate issue -- the two
4 issues that you decided, two distinct issues, which were
5 the range and the point, I think the jury can be told,
6 given where we are now, again, without waiving any of our
7 arguments. But the facts leading up to that I believe are
8 not facts -- at least many of them, that Motorola believes
9 it ever conceded should be tried by the court instead of a
10 jury.

11 And we are not to argue about how great these patents
12 are. It is not an issue here, in the sense that you are
13 not going to have Motorola experts say, we thought these
14 were the greatest patents ever, et cetera, et cetera,
15 because that is not our defense. Our defense is, we were
16 in a rush to put out these offers, and that's what we did
17 without much examination. And then the courts and the
18 jury determine whether that is fair or bad faith or not.

19 But I agree to the extent this should be an
20 issue-by-issue question. That is, is a finding of fact
21 that you made in leading up to your conclusions, is it
22 first necessary to those conclusions? And, second, is it
23 relevant to this proceeding?

24 For example, your Honor, if on appeal a court of
25 appeals said, well, Findings of Fact Number 8, we are

1 throwing it out as being totally wrong. There would still
2 be the issue of, okay, is that something necessary to the
3 conclusion that you came to? I know that you have dealt
4 with these sorts of issues.

5 And so I think you have to analyze on that sort of
6 basis. That is, what is necessary for that conclusion?
7 And, two, what is the jury entitled to decide because of
8 the right to a jury trial?

9 THE COURT: With all due respect, sir, I would
10 love to see you on the dance floor, because that is really
11 fast-moving feet. But the reason I am smiling is, you
12 picked Finding of Fact Number 8, which says I have subject
13 matter jurisdiction, which is what I thought it was.

14 All right. I understand. You can tell we don't see
15 this eye to eye, but I would welcome your proposal on how
16 to deal with this.

17 MR. PALUMBO: I don't suppose you would entertain
18 one more voice?

19 THE COURT: Why not? You can be entree number
20 three from the smorgasbord.

21 MR. PALUMBO: I think if we take Mr. Harrigan's
22 proposal, which is they are going to tell you all the
23 findings they should be able to use during the course of
24 the trial, it strikes me that the danger here is 200 times
25 Microsoft having a witness repeat your findings, and say:

1 And what was Motorola's position on that? Oh, they lost
2 that.

3 It strikes me that the way to handle this is, you are
4 going to give preliminary instructions to the jury. We
5 are in novel territory because we don't typically have a
6 situation -- There is a good deal in your findings which
7 would just be evidence offered in this trial as new
8 evidence. But we do understand your rulings, and we do
9 understand that the rate is going to come in, the range is
10 going to come in, and there are other facts which you
11 would consider to be the law of the case.

12 My suggestion is that we deal with this in a
13 preliminary instruction. That is, we may -- we and
14 Microsoft may disagree about what the jury hears in the
15 preliminary instruction, but you control that, and you are
16 in a position to decide which of your findings and
17 conclusions the jury needs to know in fairness to decide
18 the breach issue that they are asked to decide. So you
19 would give those -- everything that you thought the jury
20 could absorb and was necessary for them to hear in the
21 preliminary instructions. Thereafter, Microsoft's counsel
22 is free to argue, well, the judge has already instructed
23 you on this issue, there is no dispute about that.

24 But rather than have repeatedly during the trial some
25 Microsoft witness effectively speaking in your voice and

1 saying this is what the judge decided, and it is in our
2 favor, you make the decision and give everything to the
3 jury that you believe the jury needs to do its job and
4 decide the issues in this case, and that's how we deal
5 with it. Which I think is somewhat of a compromise
6 between what Microsoft advocates and what we advocate.
7 But it retains your role as the judge who instructs the
8 jury on the law and what they should know in order to do
9 their job. And it happens in the preliminary
10 instructions.

11 THE COURT: Counsel, at least as of today my view
12 of this is the following: It took us five months to write
13 findings and conclusions after you had a full and complete
14 opportunity to put on any evidence that you wanted. That
15 is the law of the case, those Findings of Fact and
16 Conclusions of Law.

17 I agree with Ms. Sullivan, Mr. Price and Mr. Palumbo
18 that all, whatever it is, 208 pages or 214 pages shouldn't
19 come in, because there is a lot of stuff that they really
20 don't probably need to know. It is in there and it is
21 simply going to be confusing, and if it goes back to the
22 jury room it will create some difficulty with them getting
23 home before Christmas.

24 I believe that the appropriate way to deal with this
25 is for you all to prepare your agreed Instruction

1 Number 2, and include in there anything that you think is
2 appropriate, and also, as Mr. Harrigan has suggested, you
3 give me a list of those items that are going to come up as
4 part of your testimony. That way we won't have the
5 discussion of items that are in the Findings of Fact and
6 Conclusions of Law, which are irrelevant to the second
7 part of this case. But that's the way, at least as it
8 stands right now, is the only way we can deal with this.

9 Mr. Palumbo, the problem I have with your proposal is
10 I don't know what you are putting on for your evidence,
11 and therefore I can't tell you what appropriately needs to
12 come out of those Findings and Conclusions. The best way
13 that I know how to deal with that is to have both counsel
14 come up with a list of Findings and Conclusions that they
15 intend to use, and then allow you the opportunity to say
16 here is what the problem is with them.

17 That will be the court's tentative resolution of how
18 to deal with this.

19 Mr. Harrigan.

20 MR. HARRIGAN: Your Honor, would Monday of next
21 week be an appropriate time for us to -- for the parties
22 to provide that to the court?

23 THE COURT: That would be fine.

24 All right. Moving on. Menenberg, I have a nice
25 letter from -- I think they are making Mr. Palumbo sign

1 these these days, saying, Menenberg, Judge, you can't let
2 them do that to us.

3 I must say that Ms. Robbins, who seems to be in the
4 back row here today, slipped in some language that I
5 didn't catch in regards to allocation of time entries to
6 the H.264 patent and the 802.11 patent. When was the
7 first time that Mr. Menenberg had in a proffered report
8 that allocation to which standard?

9 MR. HARRIGAN: By the way, your Honor, we have a
10 response to the letter that you got from Motorola to hand
11 up to you now, and would be happy to talk about that. But
12 Ms. Robbins is the leading expert on this, so I think --

13 THE COURT: I want to know, was the first time
14 when you walked from your table and went over and handed
15 something to Mr. Price, or was it previous to that?

16 MS. ROBBINS: July 31st, your Honor.

17 THE COURT: Pardon me?

18 MS. ROBBINS: July 31st.

19 THE COURT: When was that, in terms of hearings
20 that we have held here?

21 MS. ROBBINS: Right. It was following the hearing
22 where we said that we were going to be doing that.

23 THE COURT: Then he is not going to be permitted
24 to allocate time entries between to the standards. I laid
25 down a clear rule in regards to Mr. Holleman that we would

1 not allow people to change their disclosed opinions to add
2 new opinions. And it sounds to me like this is clearly an
3 addition that now Microsoft is attempting to put in in
4 Menenberg's report what was previously not present.

5 Mr. Harrigan, if you would like to respond, or,
6 Ms. Robbins, whoever wants to do it.

7 MR. HARRIGAN: Yes, your Honor. Thank you. In
8 this letter we can hand up to you -- Here is what
9 happened: First of all, you have already noted
10 Ms. Robbins' comment at the hearing on July 30th with
11 regard to the allocation of 802.11, and so forth.
12 Motorola's counsel responded indicating that, in part,
13 because they have differentiated between H.264 and 802.11
14 entries, we need a deposition. Well, the person who --
15 And there were two depositions set. Actually, the court
16 said since Menenberg is, quote, "down to basically being
17 an adding machine," unquote, you weren't sure any
18 deposition of him was necessary, but one of Mr. Killough
19 is necessary because he had done the allocations. He also
20 did the 802.11 and H.264 allocation. His deposition was
21 taken yesterday with that information in front
22 of counsel --

23 THE COURT: And I have not made any ruling in
24 regards to Mr. Killough testifying about it. But
25 Menenberg is not going to testify about it, because it is

1 not in his report.

2 MR. HARRIGAN: Right. Essentially, your Honor,
3 they will also, by the way, be deposing Menenberg in a day
4 or two.

5 The analytical work here of making this allocation
6 between 802.11 and H.264 was all done by Mr. Killough.
7 Menenberg is in fact acting as an adding machine. And
8 Mr. Killough has already testified and been interrogated
9 about this. And, if necessary, I guess, he could add up
10 the numbers. But all we are doing is saving, in effect,
11 the jury the trouble if this ever comes up, because it
12 doesn't even matter unless we win on one and lose on the
13 other standard. So it is only a contingency plan anyway.
14 The essence of the testimony is which entry belongs to
15 which category and which belongs to both.

16 THE COURT: I understand that. If I were Motorola
17 I would be standing up in my rebuttal and saying, well,
18 then, let them depose Mr. Holleman, because, gosh, he can
19 be deposed and he can have all of his revised testimony
20 can come into this case.

21 The rule I laid down was if it wasn't in the expert
22 reports, you are not going to get to slip it in after the
23 Daubert motions. That is basic fairness. It applies to
24 both sides.

25 Mr. Killough, if he did that calculation, and he was

1 deposed, then I'm more likely than not going to permit him
2 to testify about it. But you don't then get to have your
3 expert opine on something that is not in his expert
4 report.

5 MR. HARRIGAN: Thank you, your Honor.

6 THE COURT: Following that one then is my personal
7 favorite, which is back to Germany. I have before me
8 Mr. Harrigan's letter of August 8th saying they want
9 permission to file a motion in regards to what's going on
10 in Germany.

11 And I have made some notes in regards to this, so
12 please listen carefully. I think this is the last thing I
13 am doing out here today, so I started off saying,
14 "finally." On October 21st, 2010, Motorola sent Microsoft
15 a letter offering a worldwide RAND license on 802.11
16 standards-essential patents. On October 29, 2010,
17 Motorola sent Microsoft a similar letter in regard to
18 H.264 standards-essential patents. Since November 2010
19 the parties have litigated in this court what the
20 worldwide, and I stress "worldwide," RAND rate should be.
21 And if you have any questions about where I come up with
22 the word "worldwide," I would invite you to look at
23 Motorola's letter which sets forth that they are offering
24 a worldwide RAND rate. Quote, "This letter is to confirm
25 Motorola's offer to grant Microsoft a worldwide

1 nonexclusive license." The last time I checked, Germany
2 was included in worldwide.

3 Taking up the challenge, this court set the worldwide
4 RAND rate in an order dated April 25, 2013. In this
5 proceeding Motorola has presented evidence regarding both
6 its American and European patents. If you wanted to see
7 some proof of that, take a look at paragraphs 163, 165 and
8 521 in the Findings of Fact and Conclusions of Law which
9 reference the presentation of the European patents as part
10 of this lawsuit, this litigation, this courthouse and this
11 order.

12 Motorola took up my order in regards to the German
13 litigation to the Ninth Circuit -- Motorola's pursuit of
14 the German litigation, to the Ninth Circuit Court of
15 Appeals -- which specifically notes that Motorola
16 presented American and European patents, and affirms this
17 court's ruling over the advocacy of the distinguished
18 litigator who argued on behalf of Motorola.

19 The court is aware that Motorola now disagrees with
20 the rates set by the court. I am left with the feeling,
21 however, that Motorola also feels that if it simply
22 ignores the order, it is free to re-litigate decided
23 issues. This is wrong. The appropriate remedy is to seek
24 appellate review of this court's ruling.

25 And I will tell you that at the conclusion of the jury

1 trial on breach of contract it is my intention to invite
2 the parties, as I assume they will want to do, to ask me
3 to certify the rulings in regards to RAND and breach of
4 contract for appellate review.

5 I do that because it doesn't make any sense for us to
6 continue to toil here in the vineyards for another two
7 years before you have a chance to ask the Court of Appeals
8 to review my ruling. That's your remedy. And the court
9 will hold you to that remedy.

10 Turning then to --

11 MS. SULLIVAN: Your Honor, may we be heard on this
12 issue?

13 THE COURT: Not right now. Let me finish first.

14 MS. SULLIVAN: Thank you.

15 THE COURT: On August 8th of 2013, Microsoft
16 notifies the court that something has happened in Germany,
17 which it characterizes as seeking further action in the
18 pending German action where the court has already dealt
19 with its prior order, and, in addition, has filed a new
20 action in its favorite forum in Mannheim, Germany.

21 Significantly, the court lacks details about both of
22 these actions and will not deal with them until after the
23 conclusion of the August 26th trial. So, in effect, I am
24 granting the motion to file a motion, but it will not
25 occur until after you have finished exhausting the

1 resources of the court in your upcoming trial.

2 I would like to give you some ground rules, however.
3 I will not take any action against the sovereign German
4 legal system. I will not enjoin the German court and
5 proceed to provoke the legal equivalent of World War III.
6 That is not a free ride for Motorola. If I find that
7 Motorola, its parent company, if it is directing this
8 strategy, or the lawyers involved in it, are undertaking
9 actions which are an effort to avoid the clear mandate of
10 this court, which was to set a worldwide RAND rate, I will
11 feel free to impose sanctions and potentially civil
12 contempt if I find that that conduct is inconsistent under
13 the court's prior ruling.

14 I do not understand the details of German law, and I
15 do not understand, based on what has been found in
16 Mr. Harrigan's letter, the two proceedings that are now
17 apparently pending. One appears to be -- what you all
18 refer to as the newly-filed action, appears to be an
19 acceptance of a Microsoft offer made under the procedures
20 employed by the German courts. As I have indicated
21 previously, I am not inclined to take action to contravene
22 what is the proper procedure in Germany.

23 The other action appears to be a continuation of the
24 lawsuit that I have already impacted, but which I have
25 impacted by directing what Motorola can or cannot do. And

1 without a better understanding of the procedural posture
2 and the details of that case, I am not going to take any
3 action at this time.

4 I have had really the wonderful benefit of spending
5 time with a number of judges, including Judge Zigann and
6 Judge Grabinski from Germany, Judge Limura from Japan,
7 Justice Floyd from England, and Judge Zhou of China. I
8 must say, there is a broad consensus on certain principles
9 that exists in this area. One principle is that the
10 industry technology -- industry and society benefits from
11 standardization; second, that patentholders are entitled
12 to a reasonable royalty; third, that royalty stacking can
13 create unacceptable royalty burdens; and, fourth, that the
14 royalty must be related to the patent's technology
15 contribution to the standard, and that standard to the
16 product.

17 But we all have slightly different systems as it
18 pertains to the procedures of our patent law. That is
19 particularly true with Germany and with Japan, who base
20 their systems on, quote, "natural law," unquote, as
21 opposed to what they would call American civil law.

22 Let me give you two markers then. One, I do not
23 intend to interfere with the German system; and the second
24 marker, Motorola is firmly within the jurisdiction of this
25 court, and the court will not allow an effort to take a

1 second bite at the apple after it has committed itself in
2 its own offer letter and in its pleadings and its
3 presentation of evidence to the fact that it litigated a
4 worldwide RAND rate in this courtroom.

5 So that will be the court's ruling in regard to the
6 Harrigan letter.

7 Ms. Sullivan. Mr. Palumbo.

8 MR. PALUMBO: Let me say something first,
9 Kathleen. Your reaction to Mr. Harrigan's letter is
10 precisely what I knew it would be. I don't hear so good
11 anymore. I have got my hearing aid in today and I had my
12 hearing aid in during the injunction hearing when you
13 repeatedly pointed to the language in Motorola's offer
14 letter regarding a worldwide license.

15 There are facts about which you are not aware which we
16 came prepared to explain to you today. I now understand
17 that you would like us to do that in briefing later. But
18 I can assure your Honor that in no way is Motorola
19 attempting to either get a second bite at the apple or
20 circumvent your very clear understanding that this was to
21 be a worldwide licensing. If you would like to hear the
22 explanation, we are ready to do that. We can do it in the
23 briefing later on. I didn't want to leave the floor open
24 for you to think that we hadn't heard what the court just
25 said.

1 THE COURT: I don't understand what is going on in
2 Germany, and I don't draw any conclusions from it. I
3 simply want it clearly understood that the consequences,
4 and I am literally talking about eight- or nine-figure
5 daily sanctions, applicable to the lawyers and the clients
6 if I find that we are playing games with my ruling. I am
7 deadly serious about this. If you want to exclude
8 yourselves from practicing in federal court, you can
9 figure out a way to do it.

10 MS. SULLIVAN: Your Honor, when your Honor speaks
11 in those terms I would respectfully request a few moments
12 of your Honor's time --

13 THE COURT: You are up. You can stay at counsel
14 table.

15 MS. SULLIVAN: Your Honor, we were quite surprised
16 to receive Mr. Harrigan's letter and find in it no
17 reference to what the German dispute is actually about,
18 which is that Microsoft offered to take a license and
19 Motorola accepted the license. The actions in Germany are
20 quite consistent with your Honor's boundaries.

21 Your Honor -- Believe me, I know all too well what
22 the boundaries of your Honor's ruling was, because it was
23 extremely important in the Ninth Circuit matter.

24 But your Honor will recall that in Docket Number 318,
25 when you formalized the anti-suit injunction, you said,

1 importantly, the order in no way enjoins Motorola from
2 pursuing the German action and receiving monetary damages
3 or any other non-injunctive relief, and in no way
4 prohibits further proceedings in Germany.

5 And, your Honor, that was very meaningful to the Ninth
6 Circuit, because the Ninth Circuit, in affirming your
7 Honor's anti-suit injunction, ruled specifically that
8 Motorola urges that the anti-suit injunction must be
9 overturned because it has disabled Motorola from enforcing
10 its German patents in the only forum in which they can be
11 enforced. This argument exaggerates the scope of the
12 injunction, which leaves Motorola free to continue
13 litigating its German patents claims against Microsoft as
14 to damages or other non-injunctive remedies to which it
15 may be entitled.

16 So, your Honor, nothing could have been more
17 scrupulously appropriate under your Honor's ruling than
18 for Motorola to continue to pursue in Germany the damages
19 and other non-injunctive relief that your Honor left open,
20 and which I would submit was a very important factor in
21 the Ninth Circuit's ruling. It is why they found your
22 ruling appropriately narrow. They said damages is left
23 open.

24 Well, what did Microsoft's offer say? We offered to
25 take a license, and it expressly said by its terms that we

1 accept for the term of this license we will pay any past
2 damages that are owed to Motorola.

3 So what is going on in Germany now? Obviously
4 Motorola is not pursuing injunctions. It has expressly
5 told the Karlsruhe appellate court that it is dropping any
6 injunctive relief claims in light of your Honor's
7 anti-suit injunction. And one of the patents has now
8 expired. So the claims have been mooted on the injunction
9 side in Germany, both by your Honor's ruling and by the
10 expiration of one of the German patents.

11 So Motorola is not seeking injunctive relief in
12 Germany, is not defying your Honor's ruling, and in fact
13 is doing exactly what your Honor and the Ninth Circuit
14 left open to it in express terms.

15 So the so-called new action, which was not sprung on
16 Microsoft last week, it was filed in July, and it is only
17 by virtue of the Hague Convention that service occurred
18 only recently, that is an action to try to obtain the very
19 thing your Honor left open, which is past damages under
20 the license that Microsoft offered to take and which
21 Motorola accepted. Sorry. It was filed in April. I
22 stand corrected. The suit was filed in April and served
23 in July by virtue of the Hague Convention.

24 Your Honor, I have to just say, what kind of irony is
25 there that Microsoft is again using things as a sword and

1 a shield? Over in Germany it is saying, well, Motorola
2 had to accept their offer in order to avoid
3 anti-competition sanctions under European law. Now they
4 come to your court and they say, oh, no, no, they can't
5 accept an offer because that would be in violation of your
6 Honor's ruling. That can't be the case. They can't use
7 an offer that they made, and that Motorola accepted, a
8 license offer, and a rate -- By the way, the acceptance
9 was in January of 2013, before your Honor issued the
10 Findings of Fact and Conclusions of Law in April.

11 So what we are arguing about in Germany is Motorola
12 contends that we have an executed contract, a license to
13 the German patents, at a rate that Microsoft offered, and
14 that we are entitled to enforcement of that as a matter of
15 contract, a license agreement, under German law, and that
16 is entirely within the bounds your Honor expressly left
17 open and was a condition of the Ninth Circuit ruling.

18 Microsoft shouldn't be telling us we had to accept the
19 offer in Germany, and then coming to this court and saying
20 you have to void the acceptance of the offer as precluded
21 by this court's jurisdiction.

22 So, your Honor, we can obviously accept your Honor's
23 offer to brief this in detail, but I needed to put on the
24 record now that Motorola is not in defiance of your
25 Honor's orders, that we have adhered to the absolute

1 letter and boundaries of those orders. We have argued
2 over two things, a license that Microsoft offered to take
3 in December of 2011, and never withdrew throughout the
4 entire course of the anti-suit proceedings right through
5 the Ninth Circuit, that Motorola accepted in January 2013.
6 The so-called new action is just a contract action seeking
7 to enforce that contract -- or to adjudicate whether that
8 is an accepted contract.

9 Microsoft is now arguing, never mind, we didn't mean
10 to accept it. We actually -- we didn't mean for your
11 response to us to be an acceptance. We will read it as a
12 counteroffer. That is a dispute of German contract law,
13 whether the license was offered and accepted. That is
14 what is going on in the so-called new action.

15 The other action is an accounting for past damages,
16 which is also within your Honor's ruling.

17 So it pains me to hear you talking about Motorola
18 trying to avoid the court's order when that is not the
19 facts at all.

20 THE COURT: Counsel, what I have said is I don't
21 know what is going on in Germany, which is why I have
22 invited the briefing. But it is not going to be now. I
23 don't wish to impugn Motorola, I don't wish to impugn
24 Google, I don't wish to impugn Quinn Emanuel. I simply
25 want the marker out there that if I find conduct which is

1 inconsistent with the fact that I set a worldwide RAND
2 rate, there will be extreme consequences. That's all I
3 want my remarks to suggest.

4 MS. SULLIVAN: Your Honor, we didn't understand
5 anything in the court's prior ruling to preclude the
6 parties from entering into a voluntary license.

7 THE COURT: I'm not saying you did. I assume you
8 are going to litigate this in Germany. They are going to
9 try to litigate it here. That's fine. We will figure all
10 of this out then. I just want the marker out there that I
11 am not going to tolerate a worldwide license which is
12 subject to a second bite at the apple in Germany; if that
13 one doesn't work, we will try Estonia. That is not what I
14 am going to permit. I am not saying you are doing that,
15 but I just want it clear that is not going to go over well
16 here.

17 MS. SULLIVAN: Understood, your Honor.

18 THE COURT: Mr. Harrigan.

19 MR. HARRIGAN: Your Honor, I will be 30 seconds,
20 but I would like to recall to the court the comments by
21 Mr. Jenner with respect to the anti-suit issue and other
22 related matters, which was: Your Honor, no matter what
23 happens in Germany, once this court rules, you can always
24 go back and adjust the amount that is set by any German
25 court, and so there is no problem. And what this is, is

1 very simply an end run around that very statement to try
2 to get a higher royalty in Germany through yet another
3 effort to preempt this court's decision.

4 THE COURT: A topic to be taken up on another day
5 when the court is better informed.

6 Counsel, I will see you all on the 26th --

7 MR. PRITIKIN: We have one more loose end.

8 MR. PALUMBO: We have several, your Honor. Sorry.

9 THE COURT: Mr. Pritikin, you got up first.

10 MR. PRITIKIN: You had mentioned earlier a
11 question about the ITC transcripts, I think it was
12 Jennifer Ochs and Kirk Dailey. And what I would suggest
13 is that perhaps we can send you a short letter on that in
14 the next day or so explaining it. They are not offered
15 under Rule 32, which governs the use of deposition
16 transcripts. In the case of Dailey, it is an admission.
17 In the case of Jennifer Ochs, Federal Rule of Evidence
18 804(b) governs the use of that transcript. We can provide
19 this in a short letter, your Honor.

20 THE COURT: Recognize I don't know who you are
21 calling as witnesses. You have given me a deposition
22 transcript with objections in it. That sounds to me like
23 you are using the deposition, and it is not for
24 impeachment purposes.

25 MR. PRITIKIN: Yes, your Honor. What we had done

1 was we had submitted these transcripts along with the
2 deposition designations. Probably shouldn't have been
3 done that way. These are otherwise admissible. And,
4 again, I would be happy to provide a short letter I think
5 that will clear this up.

6 THE COURT: Anything you can do to reduce the
7 workload on us would be appreciated.

8 Mr. Palumbo.

9 MR. PALUMBO: Your Honor, I would like to address
10 related questions, and then we also have an issue with
11 respect to the German 30(b)(6), which Mr. Cannon is going
12 to discuss.

13 First, with respect to Mr. Dailey --

14 THE COURT: Is the German 30(b)(6) some kind of
15 weapon?

16 MR. PALUMBO: It relates to the 30(b)(6) witness
17 that was proffered on the German move and where we stand
18 on that.

19 With respect to Mr. Dailey, Mr. Dailey will be
20 Motorola's corporate representative at trial. Microsoft
21 has designated his testimony in the November trial,
22 perhaps his ITC testimony, as well as his deposition.

23 Because we are all on the clock, and because it is our
24 view that the witness testimony will be more
25 understandable and less confusing to the jury if a witness

1 testifies a single time, first, we think it would be
2 appropriate if Microsoft wants to put on Mr. Dailey's
3 testimony during its case, they call Mr. Dailey live, and
4 that we are then permitted to ask Mr. Dailey questions,
5 and our examination of Mr. Dailey would not be limited by
6 the scope of Microsoft's questioning of Mr. Dailey. That
7 permits him to be up and down in a single setting, rather
8 than up in their case, and then up again in our case to
9 cover anything that is outside the scope of their
10 testimony.

11 If you permit them to use his deposition testimony,
12 and they choose not to call him live, then we still
13 believe that we should be permitted then to put Mr. Dailey
14 on the stand and ask him our questions so he would --

15 THE COURT: At that time or in your case?

16 MR. PALUMBO: I'm sorry?

17 THE COURT: In their case or in your case?

18 MR. PALUMBO: If they put him on in their case,
19 either live, which we think is the appropriate way to do
20 it, or via deposition testimony, all we are asking is that
21 our examination not be limited by the scope of their
22 examination. That permits Mr. Dailey to get on the
23 witness stand one time and then he is done.

24 THE COURT: That is customarily how I do it. I
25 have had people say that they don't want to do it that way

1 and they are reserving the right to call him as part of
2 their own case. The jury doesn't understand why -- They
3 have seen enough talking heads. They don't understand why
4 they have appeared twice. Most of the time they are eager
5 to get out of here. That's something I would expect
6 counsel to work out, unless you have a problem. The time
7 allocation is easy, I know who is asking the questions. I
8 think I just heard Mr. Pritikin say they are going to call
9 him live.

10 MR. PRITIKIN: Your Honor, this is the first I
11 knew that he would be available during our case. Let us
12 consider it, and we will get back to Mr. Palumbo. It is
13 the sort of thing we ought to be able to work out, I would
14 think.

15 THE COURT: I would think so, too.

16 MR. PALUMBO: The second issue is McNeill Taylor.
17 They say we should bring in Mr. Taylor live because he is
18 in our control. He is actually not in our control. He
19 has left Motorola and works for a competitor. So they can
20 clearly use his deposition testimony. But we don't have
21 the ability to require him to come live. I don't think
22 there should be any dispute about that, but if there is,
23 we would like to address it now.

24 MR. PRITIKIN: There is no problem with that, your
25 Honor. We just want to clarify whether we are going to

1 use the deposition or he would be here live. I think the
2 question has been answered for us.

3 MR. PALUMBO: Thank you.

4 Finally, Microsoft has designated the November 16
5 trial testimony of Jennifer Ochs from Marvell. As you
6 remember, Ms. Ochs came to the November trial voluntarily
7 from California. First, as you have noted, under Civil
8 Rule 32, it is not clear that you can use prior trial
9 testimony in addition to deposition testimony. But even
10 if that were permitted, the issue in the November trial
11 was royalty rate. The issue here is breach. So if
12 Ms. Ochs does not testify live, then I can't ask her
13 questions on cross that I would have asked her the first
14 time around had the issue been breach instead of rate.

15 As you will also recall, Microsoft did not disclose
16 its theory that Motorola's failure to grant a RAND license
17 to Marvell was part of the breach until after the November
18 trial date. I think that disclosure was May of this year.
19 If they are permitted to use Ms. Ochs' testimony from
20 November, and she doesn't show up live, then I don't have
21 the opportunity to ask Ms. Ochs questions, which I had no
22 reason or basis to ask when she testified at the November
23 trial.

24 I can give you specific examples of questions which I
25 didn't ask at that trial which I would ask now that we

1 know that the failure to give Marvell a RAND license is
2 part of their breach theory, and with the issue being
3 different -- I can give you just one example.

4 THE COURT: Here is my question: Why didn't you
5 depose her in the discovery phase of this trial?

6 MR. PALUMBO: Because you limited the number of
7 fact depositions we could take and we had to be selective.
8 She just didn't get that high a priority. But the fact
9 that we didn't have enough depositions to go take her
10 deposition -- enough fact depositions allocated to us to
11 go take her deposition. She came live voluntarily last
12 time. We think if they want to put her on, they ought to
13 call her up and have her come live this time so we can ask
14 her the questions we would ask, now that we know of their
15 new theory, and now that we have a new issue to talk
16 about.

17 THE COURT: Mr. Pritikin.

18 MR. PRITIKIN: Let me respond briefly, your Honor.
19 First, under Rule 804(b), this is the use of prior
20 testimony. If the witness is unavailable, then of course
21 it is an exception to the hearsay rule. Ms. Ochs at the
22 time she testified last November was an employee of
23 Marvell. She has since left Marvell, and she is not
24 willing to come and testify now. She came because she was
25 working for Marvell. The best we can find out is that she

1 lives somewhere in the northern California area, perhaps
2 in Palo Alto. We haven't been able to track her down
3 since she left Marvell. Clearly she is unavailable, and
4 it qualifies under Rule 804(b)(1) in that respect.

5 Insofar as what we would like to do and what we plan
6 to do is simply to read to the jury the testimony that she
7 gave in November. That testimony went not only to the
8 issue of what a RAND royalty would be, it went to the
9 whole question of what was happening with respect to
10 Marvell. Much of the testimony related to that did not
11 find its way into your Findings of Fact for the reason
12 that it was more relevant to the general background of why
13 Marvell was requesting the license and how this came
14 about.

15 The cross-examination during the trial in November, if
16 you look at that cross-examination, that too went to that
17 issue, and not to the amount of the royalty. The
18 questions that were asked of her during the
19 cross-examination related to the issue of: Why wasn't a
20 license concluded? Were you put up to this by Microsoft?
21 How did it come about? Where do the negotiations stand
22 now? So those questions, anything that related to why it
23 was that Marvell was seeking the license from Motorola,
24 those questions were explored during the
25 cross-examination. I would be hard-pressed to think of

1 questions that were not asked that they would still ask
2 her on cross-examination today if she were here.

3 THE COURT: Aren't you now arguing that the
4 relevance of her testimony is that they were willing to
5 grant a license but it had to exclude Microsoft? As I
6 read your trial submissions, that's now your point. That
7 wasn't what she testified to last time.

8 MR. PRITIKIN: I believe that is in the testimony,
9 your Honor. I'm quite certain it is. The thrust of our
10 argument with respect to Marvell -- There are really a
11 couple of aspects to it. One is that the license that
12 they provided to Marvell, the proposal, excluded
13 Microsoft, that breached the RAND commitment and was
14 discriminatory, and cut off that other avenue, that other
15 opportunity, to provided the license for the WiFi
16 technology.

17 Second, the terms of it were, as your Honor recalls, I
18 think those are probably laid out in your Findings of
19 Fact, that it was two and a quarter percent on the end
20 product that contained the Marvell chip, and that those
21 terms themselves were so onerous and so unreasonable, even
22 if they included Microsoft, those were terms that were
23 unreasonable as well.

24 THE COURT: Mr. Palumbo, I believe that your
25 client's owner is somewhere in California.

1 MR. PALUMBO: Somewhere.

2 THE COURT: I think they could find her if they
3 wanted to. If you need to take her deposition, you will
4 find a receptive party here that will allow you to do that
5 for an hour or two hours.

6 MR. PALUMBO: If that is your Honor's ruling. Let
7 me give you a couple of examples of --

8 THE COURT: You don't need to. I recall this
9 because I have been recently reading it. Quit while you
10 are ahead, sir. If you run into a problem locating her,
11 you have some time.

12 Mr. Cannon.

13 MR. CANNON: Good afternoon, your Honor. There
14 was one other issue that remained. That was the letter we
15 sent in on July 23rd, and Microsoft sent an opposing
16 letter the 26th, having to do with discovery into the
17 causation aspects as to why Microsoft moved its European
18 distribution.

19 THE COURT: You lost on it.

20 MR. CANNON: Okay.

21 THE COURT: At some point it has to end. You got
22 as much out of it as you were going to get. I am not
23 prepared to reopen it. Both sides played the "privilege"
24 card. I'm not going to hear anything further beyond my
25 rulings today. Sorry. I'm sure you had a brilliant

1 argument planned.

2 MR. CANNON: I was ready to go.

3 THE COURT: Anything further, counsel?

4 MR. HARRIGAN: No, your Honor.

5 MR. PALUMBO: Thank you, your Honor. Nothing
6 more.

7 THE COURT: We will be in recess. Thank you,
8 counsel.

9 (Adjourned.)

CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning